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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No. 723

INTER-CITY TRANSPORTATION CO. INC.,

Petitioner,

*against*

HENRY A. BARNES, as Commissioner of Traffic of the City of New York,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT**

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

Petitioner Inter-City Transportation Co. Inc. (plaintiff and appellant below), prays that a writ of certiorari issue to the Supreme Court of the State of New York, Appellate Division, First Judicial Department, in this cause.

### Opinion Below

The opinion of the Special Term of the New York Supreme Court, New York County, which determined this action in the first instance, is not officially reported. It is printed in Appendix A hereto. The Appellate Division

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NOTE: Figures in parentheses refer to portions of the Record in the New York Courts, submitted herewith, by folio numbers except where otherwise indicated.

of the New York Supreme Court, First Judicial Department, affirmed without opinion. Its decision is reported at 19 App. Div. (2d) 778. The Court of Appeals of the State of New York denied, without opinion, leave to appeal to that Court. Its decision is reported at 13 N. Y. 2d 930.

## Jurisdiction

The highest New York court in which a decision could be had was the Appellate Division of the Supreme Court, First Judicial Department. That Court affirmed a summary judgment of the Supreme Court, New York County, dismissing the complaint. The New York Court of Appeals denied leave to appeal to that Court, on October 3, 1963. A copy of its order appears in Appendix E hereto.

On October 15, 1963, petitioner applied to the Appellate Division for amendment of its remittitur and a certificate that on the appeal to that Court questions under the Constitution and Statutes of the United States were necessarily considered, and were determined adversely to petitioner. On December 18, 1963, that application was granted, and the following questions were certified (p. 89):

> "(a) defendant's contention, based on Article I, Section 8 of the Constitution of the United States and the Motor Carrier Act, 49 USC § 307(b) that plaintiff's certificates of public convenience and necessity granted by the Interstate Commerce Commission for interstate operation of commuter buses in New York City and suburban New Jersey did not authorize stoppage of buses on public streets to pick up or discharge passengers; and
>
> (b) defendant's contention, based on his interpretation of 49 USC § 307(b), that the New York City Traffic Commissioner had authority to order material

modification of plaintiff's use of street routes designated by the Interstate Commerce Commission, by restricting their use in New York City to transit with 'closed doors' entailing no pick up or discharge of passengers; and

(c) plaintiff's contention that final disposition of the issues in this action on affidavits without trial constituted a denial of due process under the Fourteenth Amendment of the Constitution of the United States, substantively and procedurally.

The jurisdiction of this Court is thus invoked under 28 U.S.C. § 1257(3); and the present petition is timely.

## Questions Presented for Review: How They Appear

The Federal questions now adduced were raised, among others, in the pleadings and in affidavits submitted on petitioner's application for an injunction *pendente lite*, at the commencement of this action. Petitioner sought a judgment declaring a prohibitory order of the Traffic Commissioner of the City of New York (here respondent) invalid, and enjoining its enforcement. The prohibitory order is in form an exercise of regulation-making power given respondent by state legislation, the New York City Charter. The prohibitory order forbids petitioner, an operator of suburban omnibuses in interstate commerce, to continue the pickup and discharge of passengers on City streets. Violation of such an order is punishable by fine and imprisonment.

The complaint alleges that petitioner is a common carrier of passengers for hire between the States of New York and New Jersey, under certificates of convenience and necessity issued pursuant to the Motor Carrier Act (fols. 23-24); and that respondent's order is "unconstitu-

tional in that it is discriminatory and otherwise a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States . . .", "deprives the plaintiff of its liberty and property without due process of law", is "an interference with commerce among the states in violation of the provisions of Article I, Section 8 of the Constitution of the United States" and "is unconstitutional as it impairs the obligation of a valid and subsisting lease and contract by plaintiff in violation of Article I, Section 10 of the Constitution of the United States" (fols. 56-58).

The answer affirmatively pleads that although "engaged in the business of a common carrier for the transportation of passengers for hire by motor vehicle between the State of New York and the State of New Jersey" . . . petitioner "does not have any statutory, constitutional or any other legal right to use the public streets of the City of New York for the pick-up or discharge of passengers for hire" (fols. 75-76, 81-82).

Respondent cross-moved on the pleadings and affidavits for summary judgment dismissing the complaint, arguing that petitioner could not prevail as a matter of law and that there was no factual issue to be tried. Petitioner's motion was denied and respondent's cross-motion was granted; and from such determination petitioner appealed to the Appellate Division of the New York Supreme Court, First Judicial Department, which affirmed without opinion or dissent. No general appeal to the New York Court of Appeals being available in this state of the record, unless that Court gave permission, petitioner made timely application for such permission, which was denied as above set forth.

The opinion of the New York Supreme Court, New York County, on dismissal of the complaint, says there was "no showing of . . . constitutional rights invaded . . ." (fol.

253), and makes no other reference to the questions here relied on. Such lack is now supplied by the Appellate Division's order of December 18, 1963, amending its remittitur, *supra*, pp. 2-3.

## Statutes Involved

United States constitutional and statutory provisions involved are set forth in Appendix B; other statutory provisions appear in Appendix C, *infra*.

## Statement of Case

Petitioner operates short-haul, suburban motor buses *via* the George Washington Bridge over the Hudson River, between various northern New Jersey communities and upper Manhattan in New York City, and has been doing so for over thirty years. Petitioner is in direct competition with two other operators in such service. After the coming into effect of the Motor Carrier Act (49 U.S.C. §§ 301, *et seq.*) the Interstate Commerce Commission granted petitioner certificates of public convenience and necessity, naming the termini and the highways, streets and avenues of petitioner's Bridge routes, both in New Jersey and in New York, and authorizing and requiring petitioner as a common carrier to render interstate passenger transportation service on such routes, "serving all intermediate points." The certificates* do not speak of the manner in which petitioner's vehicles are to be operated; and that has always understood to be the characteristic manner of omnibuses, *viz.* moving on fixed routes along the public highway in the stream of general traffic, and stopping on the highway to take on or discharge pas-

* These certificates, though not in the record at the Special Term, New York County, were submitted by respondent to the Appellate Division, First Department, on the argument of the appeal. Relevant excerpts appear in Appendix D hereto.

sengers, at "all intermediate points", suited to the public convenience.

In Manhattan, petitioner's operations feed passengers to the city subway on inbound runs, and draw passengers from the subway on outbound runs. The bulk of petitioner's patrons are daily commuters. Petitioner has at all times made a stop on inbound trips, at an "intermediate point" on the street close to the Manhattan end of the George Washington Bridge. There is a subway entrance close by, which is preferred by the Manhattan-bound commuter, who would lose time if he postponed his change to the subway until the bus reached the next subway entrance, five-eighths of a mile beyond. Petitioner's Manhattan terminal is on leased private property, at St. Nicholas Avenue and 167th Street, close by the terminals lately maintained by petitioner's competitors in Bridge operations entailing the use of the same "Bridge stop" on the street.

Although circumstances from time to time required change of the precise location of the "Bridge stop" for inbound commuter buses, it has always been where convenient access to the subway could be had*; and the New York City officials concerned with traffic control sanctioned it—until January, 1963, when petitioner's two competitors shortened their George Washington Bridge routes so as to quit using New York City streets altogether. They now begin and end such trips at the Bridge itself, on an elevated structure connected thereto by ramps, in a new bus terminal operated by the Port of New York Authority. That structure provides convenient passenger

* In view of the disposition of this action by summary judgment without trial, it is noteworthy that the history of this street stop for commuter bus service is alleged fully in the complaint (26-27, par. 5), admitted by the verified answer, asserted additionally by affidavits considered below and additionally proved by the Proceedings of the Board of Estimate of the City of New York (163, 165-166, 172, 210-211, 214-216).

access to the subway, and is closely adjacent to the "Bridge stop" in the street used by petitioner's passengers for like access. (One of those competitors had lost the lease of its own Manhattan terminal; the other had outgrown and sold its Manhattan terminal; only the petitioner continued to be bound by a terminal lease—to June, 1960—and by substantial investment in the improvements thereon.)

Thereupon respondent, who has authority under the New York City Charter to make traffic regulations, issued the prohibitory order in suit. In terms, it revoked his prior approval of the precise stopping point near the Bridge which petitioner was using, recited as the sole reason it was issued, "because of the opening of the George Washington Bridge Terminal," forbade petitioner to stop its Bridge buses *anywhere* on City streets for passengers to get on or off, and expressly limited petitioner to "closed-door service between New Jersey and your 167th Street Terminal" (fols. 67-69).

Petitioner could not comply with respondent's order and yet render the transportation service called for by the Interstate Commerce Commission certificates. That order contradicted the I.C.C. certificates by forbidding service at "all intermediate points" in New York State; and it was calculated to set in motion economic forces that would oblige petitioner to discontinue its use of City streets constituting its route as described in those very I.C.C. certificates.

Respondent states in the present record (fols. 121, 122) that he issued this order to achieve "the removal of buses using the George Washington Bridge from City Streets"; he knew and averred (fol. 136) that, "A very high proportion of the passengers on incoming buses . . . enter the Independent Subway Station at 175th Street" (the station in question in this matter); so that, when confronted by this order, petitioner would be constrained to follow its competitors into the new Port Authority bus terminal, lest

it lose the essential patronage of that "very high proportion of passengers on incoming buses." The Port Authority bus terminal is a stub-end structure that cannot be used as a way-station; buses enter it from the Bridge, turn around within it and depart toward New Jersey *via* the Bridge; hence petitioner could make no practical or economic use of *both* terminals and would be obliged to abandon its own terminal as well as the route between that terminal and the State line.

## Reasons for Granting the Writ

### (1)

In relation to interstate commerce by motor carrier there are presented questions of general interest transcending petitioner's concerns, and of first impression, viz:

(a) The respondent's prohibitory order affects only interstate commerce, to wit, petitioner and petitioner's passengers in the use of the streets, and petitioner's competitive relation to other carriers which do not use city streets. It is thus not entitled to the tolerance shown local regulations that affect interstate and intrastate commerce indifferently, as in *South Carolina Highway Department* v. *Barnwell Bros.*, 303 U. S. 177, 187; *Railway Express Agency* v. *New York*, 336 U. S. 106, 111; and *Buck* v. *California*, 343 U. S. 99. Professing a "sworn duty to treat all interstate bus operators in this area equally", the respondent argued below that, had he not issued the order, he would have given "plaintiff a preference under the law" (fol. 129). The New York courts, while finding that there were "improved traffic conditions" at the *locus in quo*, sustained the order lest petitioner "receive a consideration which discriminates against all users of the [Port of New York Authority's interstate-commerce *only*] Bus Terminal" (fol. 254). Thus we have here a State agency assuming to regulate competition in interstate commerce between petitioner on the one hand,

and petitioner's competitors on the other, although the latter are wholly outside the State agency's statutory jurisdiction—they do not use the State's highways.

Such an order and the judgment sustaining it constitute a prohibited encroachment into an exclusively federal area, as clearly as when a state agency attempts to attach conditions to the right to engage in interstate commerce, either conditions precedent (*Chicago* v. *Atchison, Topeka & S. F. Ry. Co.*, 357 U. S. 77, or conditions subsequent (*Castle* v. *Hayes Freight Lines*, 348 U. S. 61); or when a state agency claims jurisdiction over intrastate elements of activity which is integral with interstate commerce (*Service Transfer Co.* v. *Virginia*, 359 U. S. 171).

(b) The judgment below was arrived at in disregard of this Court's admonition to state courts and agencies not to volunteer their own interpretation of Interstate Commerce Commission certificates of public convenience and necessity. It rests on the New York courts' original interpretation of petitioner's certificated rights and duties under 49 U.S.C. § 307(b). It holds that within New York City petitioner has absolutely no legal right, "statutory, constitutional or any other" to stop on the public roadway to receive or discharge passengers, and that such stoppage is but a "gratuitous license revocable at will" by City authority (as respondent contended below: Special Term Reply Memorandum, p. 3). This interpretation is wholly inconsistent with petitioner's duty to render service at "all intermediate points." It is completely without precedent. It was never submitted to the Interstate Commerce Commission, despite this Court's declaration in the *Service Transfer* case, *supra* (359 U. S. at p. 177):

> "It appears clear that interpretations of federal certificates of this character should be made in the first instance by the authority issuing the certificate and upon whom the Congress has placed the responsibility of action."

The national highway transportation policy reflected in the Motor Carrier Act indispensably requires uniformity and consistency of interpretation of certificates of the Interstate Commerce Commission (a requirement which could not possibly be realized by a multiplicity of state courts, commissions and officers); moreover, § 307(b) of 49 U.S.C. on which the Courts below relied, was misinterpreted by them. The section reads,

> "No certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highways."

This section has no special reference to stoppage as distinguished from transit in the use of the public highways; and it means *only* that certificates like petitioner's confer no monopoly rights: the Commission may issue a like certificate to another carrier. *St. Johnsbury Trucking Co. Inc.* v. *United States*, 99 Fed. Supp. 977, 981; *Capital Transit Co.* v. *United States*, 97 Fed. Supp. 614, 620; *Consolidated Freightways* v. *United Truck Lines*, 330 Pac. 2d 522; 216 Ore. 515, 519, cert. den., 359 U. S. 1001.

Stoppage on the roadway for passengers to get on or off omnibuses has always been an indispensable, commonplace element of omnibus operation, so that if the omnibus operation is lawful, such stoppage is lawful. *Callanan* v. *Gilman*, 107 N. Y. 360, 365; *Rex* v. *Cross*, 3 Camp. 224; *Sales* v. *Lake* [1922], 1 K. B. 553. Omnibus use is a participation in the public easement of the streets and highways, on a basis of mutual accommodation with all other utilizations of the public easement. It is that mutual accommodation which municipal traffic regulation properly regulates. Such regulation cannot properly operate to nullify completely the omnibus' essential right of stoppage.

In the field of interstate commerce, the present instance appears to be the first challenge by a municipality to the proposition that an omnibus' right of stoppage on the

highway is integral with its right of transit; but in the intrastate field such a municipal attempt has already been defeated. See *Parker* v. *Silverton*, 109 Ore. 298, 305, 220 Pacific 139, 141:

> "To receive and discharge passengers on the public streets of a city is an essential and necessary part of the transportation by automobile buses of passengers from one place to another, and when this is being done in the usual and customary way, under a permit regularly issued by the Public Service Commission, it is not within the power of a municipality to prevent or prohibit."

The question whether authority to receive and discharge passengers on the streets of a city is implicit in an Interstate Commerce Commission certificate of public convenience and necessity that calls for suburban omnibus transportation on those very streets is one that (despite diligent search) seems never to have been passed upon by that Commission or by any Federal court, or by any state court until the present instance. The determination of this question by the New York courts in the instant case is both at variance with the common law authorities indicating the breadth and scope of the public easement in streets and highways, and restrictive of interstate commerce as heretofore conducted, not only by petitioner, but by other carriers engaged in like operations under like certificates of the Interstate Commerce Commission. The Court to which certiorari is now sought certifies that in reaching its decision adverse to petitioner it necessarily considered this question in relation to Article I, Section 8 of the Constitution of the United States and to the Motor Carrier Act, especially 49 U.S.C. § 307(b) (*supra*, pp. 2, 3). If that Court decided rightly, any municipality may forbid suburban interstate omnibuses to stop anywhere on its streets for passengers—to the manifest disservice of the very public whose convenience and necessities in such matters are

committed to the Interstate Commerce Commission by the Motor Carrier Act.

We submit that this question is substantial, is important to the public welfare, and deserves the attention of this Court.

**(2)**

Reliance below on incorrect rules of substantive law touching petitioner's rights and respondent's powers brought about a failure of the procedural device of summary judgment to render petitioner due process of law. This can be shown without marshaling evidential material, *viz.:*

(a) Petitioner's complaint in this action and its affidavits in support of the motion for an injunction *pendente lite* tacitly presupposed that the receiving and discharging of interstate passengers on city streets was an inherent and rightful element of petitioner's suburban operations as long conducted both before and since their formal sanction by the Interstate Commerce Commission; and, recognizing that all petitioner's operations on public highways are subject to reasonable traffic regulation, challenged the validity of the prohibitory order by a richly circumstantial demonstration that it was grossly unreasonable (fols. 22-63; 160-237). In New York, as generally elsewhere, the authorities hold that any municipal regulation promulgated under a general grant of power (in this instance, New York City Charter § 883; *infra*, Appendix C, p. 18) is invalid unless it is reasonable.

Respondent's answer and affidavits seeking summary judgment of dismissal deny the allegations indicating unreasonableness, but put major reliance on an affirmative defense that petitioner "does not have any statutory, constitutional, or any other legal right to use the public streets of the City of New York for the pickup or discharge of passengers for hire" (Answer, fols. 81-82).

No authority has ever been cited for this assertion. None exists.

Obviously, if the assertion just quoted were correct, the test of reasonableness would be much less important than if it were recognized that petitioner suffered impairment of rights by the prohibitory order. The Courts below clearly erred by holding that that assertion was correct. Certified questions (a) and (b) so show, particularly in relation to interstate commerce (*supra*, pp. 2 and 3).

Without that error, the Courts below would have considered fully the uncontroverted, factual material in the pleadings and affidavits, denied respondent's motion to dismiss and either granted petitioner the judgment it prayed for or directed a trial of the sole real issue: was the prohibitory order a reasonable exercise of authority to regulate traffic?

(b) Not in the present record, but repeatedly in argument before the New York Courts, respondent resorted to dialectical legerdemain *with apparent success*, but no license in law or logic, *viz.*: He referred to the prohibitory order of January 14, 1963 (which precipitated this law suit) as action on his part fully authorized by Section 122 of the City's standing code of Traffic Regulations, as if Section 122 had its own separate vitality and validity, beyond the reach of attack on the prohibitory order. That section says, "No driver of a bus shall pick up or discharge passengers on any street except at bus stops designated by the Commissioner in writing" (Appendix C, p. 19). Respondent's brief in the Appellate Division (p. 14 thereof) says, "This section clearly vests in the Traffic Commissioner the power to designate bus stops for buses." The same contention is urged in respondent's brief opposing appeal to the New York Court of Appeals (p. 11 thereof); and the inference urged is that the prohibitory order merely revoked a gratuitous privilege, leaving a "normal"

status in which no right to pick up or discharge passengers on the street existed.

Actually, Section 122 vests respondent with no power: it is one of *his own* many exercises of power, the sole source of which is New York City Charter, § 883. Section 122, considered alone, is but procedural; it is a device to create administrative feasibility, a broad prohibition plus provision for specific exceptions made available of record. Petitioner's attack on the prohibitory order was as well an attack on Section 122 as qualified by the prohibitory order, refusing all exceptions.

## CONCLUSION

**The writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, should be granted.**

Dated, New York, January 1, 1964.

Respectfully submitted,

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## APPENDIX A

### Opinion of Supreme Court, Special Term

Vol. 149, No. 79, New York Law Journal, p. 15, April 24, 1963.

By Mr. Justice Carney.

Inter-City Transp. Co., Inc. v. Barnes—Plaintiff moves for a temporary injunction. Defendant cross-moves for summary judgment dismissing the complaint. Plaintiff complains of an order eliminating as of February 4, 1963, two bus stops in the vicinity of One Hundred and Seventy-seventh Street and Broadway, Manhattan, City of New York. An inbound stop was established by order effective August 24, 1959, for the duration of the period of construction of the new level of the George Washington Bridge. The outbound station was established by an order effective for a period of ten months from March 22, 1961, also because of the construction. The construction is completed. Indeed, defendant [*sic*] had notice and was warned as early as 1953 of the forthcoming construction which would alleviate traffic conditions in the area and bring about a change in traffic and traffic regulations. Plaintiff charges that the order is arbitrary, unnecessary to the correction of transit conditions now improved by reason of the use of the new Bus Terminal, that the purpose is to compel plaintiff to use the new Bus Terminal, and that, finally, the elimination of the two bus stops will render valueless plaintiff's bus terminal at One Hundred and Sixty-seventh Street and St. Nicholas Avenue, Manhattan, City of New York. Thus warned in 1953, plaintiff should have made such arrangements with respect to its One Hundred and Sixty-seventh Street terminal as to avoid the alleged financial loss. Moreover, plaintiff is free not only to make use of the new Bus Terminal but to elect to

continue its inter-state runs to the One Hundred and Sixty-seventh Street terminal, without stops, however, at One Hundred and Seventy-seventh Street. Plaintiff cannot now take advantage of the improved traffic conditions produced by the construction of the new terminal and bridge level and traffic regulations, and thereby receive a consideration which discriminates against all users of the Bus Terminal. There is no showing of any vested or constitutional rights invaded or of arbitrary or illegal action taken. The motion is denied, and the cross-motion is granted. Settle order.

## APPENDIX B

### Constitutional and Statutory Provisions Involved

CONSTITUTION OF THE UNITED STATES,
ARTICLE I, SECTION 8

The Congress shall have Power

* * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * *

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

ARTICLE I, SECTION 10

No State shall . . . pass any . . . Law impairing the Obligation of Contracts, . . .

AMENDMENT XIV.

Section 1. . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### Federal Statutes

INTERSTATE COMMERCE ACT, PART II; MOTOR CARRIERS
49 USC §§ 301 et seq.

§ 302. *Application of provisions*

(a) The provisions of this chapter apply to the transportation of passengers or property by motor carriers

engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is vested in the Interstate Commerce Commission.

(b) Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

* * * * *

§ 303. *Definitions and exceptions—(a) Definitions*

As used in this chapter—

* * * * *

(10) The term "interstate commerce" means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water.

* * * * *

(12) The term "highway" means the roads, highways, streets, and ways in any State.

* * * * *

§ 307. *Issuance of certificate—(a) Issuance authorized to qualified applicants for regular routes and between fixed termini*

* * * *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

*Appendix B*

**Certificate not to confer proprietary or property rights in highway**

(b) No certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highways. Feb. 4, 1887, c. 104, Pt. II, §207, as added Aug. 9, 1935, c. 498, 49 Stat. 551.

* * * *

§312. *Suspension, change, revocation and transfer of certificates, permits, and licenses*

(a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however*, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 304(c) of this title, commanding obedience to the provision of this chapter, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further*, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, per-

mit, license, or any application filed pursuant to the provisions of sections 306, 309, or 311 of this title, or by virtue of the second proviso of section 306(a) of this title or temporary authority under section 310a of this title, may be suspended by the Commission upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of sections 311(c), 317(a), or 318(a) of this title or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

* * * * *

# APPENDIX C

## State Statutes

THE NEW YORK CITY CHARTER, ADOPTED PURSUANT TO LAWS OF 1961, CHAPTER 87

### Chapter 40

### DEPARTMENT OF TRAFFIC

*Department; Commissioner*

§ 881. There shall be a department of traffic the head of which shall be the commissioner of traffic.

• • •

*Powers and Duties*

§ 883. The commissioner shall have the power and it shall be his duty to:

(a) Make such rules and regulations for the conduct of vehicular and pedestrian traffic in the city, in the streets, squares and avenues in the city as he may deem necessary, which rules and regulations shall not become effective until filed with the city clerk and published in the City Record. The violation of such rules and regulations shall be triable by a city magistrate and punishable by not more than thirty days' imprisonment, or by a fine of not more than fifty dollars, or both. The police commissioner may, in any emergency, suspend for a period of forty-eight hours the provisions of any such rule or regulation and shall forthwith notify the department of traffic thereof. In order to expedite the movement of traffic or to safeguard pedestrians or property, a police officer may order a person to disregard any traffic signal or any such rule or regulation.

• • •

(g) Make recommendations to the mayor in regard to methods of ameliorating traffic conditions which adversely affect the welfare of the city and which cannot be remedied by traffic rules or regulations.

TRAFFIC REGULATIONS ESTABLISHED BY THE COMMISSIONER OF TRAFFIC PURSUANT TO THE NEW YORK CITY CHARTER

BY VIRTUE OF THE AUTHORITY VESTED in me by law, as Commissioner of Traffic of The City of New York, I hereby revoke the Traffic Regulations effective July 1, 1958, and promulgate Traffic Regulations effective that date to read as follows:

* * *

Article 11

BUSES

§ 122. Bus stops.

No driver of a bus shall pick up or discharge passengers on any street except at bus stops designated by the Commissioner of Traffic in writing. . . .

## APPENDIX D

C-15.1

[Condensed]

**Certificate of Public Convenience and Necessity**

No. MC 668*

INTER-CITY TRANSPORTATION CO., INC.
PATERSON, NEW JERSEY

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 28th day of December, A. D. 1955

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

REGULAR ROUTES:

Passengers and their baggage, and express and newspapers in the same vehicle with passengers,

*Appendix D*

Between Ridgewood, N. J., and New York, N. Y., serving all intermediate points:

From junction East Ridgewood Avenue and Broad Street in Ridgewood over East Ridgewood Avenue to junction Paramus Road, thence over Paramus Road (through Paramus, N. J.) to junction Passaic Street, thence over Passaic Street (through Rochelle Park, Maywood, and Hackensack, N. J. ) to junction State Street, thence over State Street to junction Mercer Street, thence over Mercer Street to junction River Street, thence over River Street (through the Hackensack Municipal Bus Terminal) to junction Bridge Street, thence over Bridge Street to junction Court Street, thence over Court Street to junction Fort Lee Road, in Bogota, N. J., thence over Fort Lee Road to Junction River Road, thence over River Road to junction Main Street, thence over Main Street to junction Palisade Avenue, thence over Palisade Avenue to junction Fort Lee Road, thence over Fort Lee Road (through Teaneck, N. J.) to junction Central Avenue in Leonia, N. J., thence over Central Avenue to junction Grand Avenue, thence over Grand Avenue to junction West Central Boulevard in Palisades Park, N. J., thence over West Central Boulevard to junction Broad Avenue, thence over Broad Avenue to junction New Jersey Highway 6, thence over New Jersey Highway 6 (through Fort Lee, N. J.) to junction New Jersey Highway 4, thence over New Jersey Highway 4 to the George Washington Bridge, thence over the George Washington Bridge to New York City, thence over 178th Street to junction Wadsworth Avenue, thence over Wadsworth Avenue to junction 174th Street,

thence over 174th Street to junction Audubon Avenue, thence over Audubon Avenue to terminal at 167th Street and St. Nicholas Avenue in New York City (also over 178th Street to junction Wadsworth Avenue, thence over Wadsworth Avenue to junction 183rd Street, thence over 183rd Street to junction Audubon Avenue, thence over Audubon Avenue to terminal at 167th Street and St. Nicholas Avenue), and return over the following route: From terminal at 167th Street and St. Nicholas Avenue in New York City over St. Nicholas Avenue to junction 179th Street, thence over 179th Street to the George Washington Bridge, thence to junction East Ridgewood Avenue and Chestnut Street in Ridgewood, as specified above, thence over Chestnut Street to junction Franklin Avenue, thence over Franklin Avenue to junction Broad Street, and thence over Broad Street to junction Broad Street and East Ridgewood Avenue in Ridgewood.

Between junction Maywood Avenue and Passaic Street in Maywood, N. J., and junction Maywood Avenue and New Jersey Highway 4 in Paramus, N. J., serving all intermediate points:

From junction Maywood Avenue and Passaic Street over Maywood Avenue to junction New Jersey Highway 4, and return over the same route.

RESTRICTION: The carrier may conduct the immediately above-described operations only in connection with its operations to and from New York, N. Y., by way of the George Washington Bridge.

Between Hohokus, N. J., and New York, N. Y., serving all intermediate points:

*Appendix D*

From junction Sheridan Avenue and Ardmore Road in Hohokus over Sheridan Avenue to junction Franklin Turnpike, thence over Franklin Turnpike to junction North Maple Avenue, thence over North Maple Avenue (through Ridgewood) to junction Franklin Avenue, thence over Franklin Avenue to junction North Broad Street, thence over North Broad Street to junction East Ridgewood Avenue, thence over East Ridgewood Avenue to junction Paramus Road in Paramus, thence over Paramus Road to junction Passaic Street, thence over Passaic Street (through Rochelle Park Maywood, and Hackensack) to junction Linden Street, thence over Linden Street to junction Anderson Street, thence over Anderson Street to junction Cedar Lane in Teaneck, thence over Cedar Lane to junction River Road, thence over River Road to junction New Jersey Highway 4, thence over New Jersey Highway 4 (through Englewood and Fort Lee) to the George Washington Bridge, and thence to terminal at junction 167th Street and St. Nicholas Avenue in New York City, as described above, and return over the following route: From the terminal at junction 167th Street and St. Nicholas Avenue in New York City over St. Nicholas Avenue to junction 179th Street, thence over 179th Street to the George Washington Bridge, and thence to Hohokus over the route specified above.

Between Hohokus, N. J., and New York, N. Y., serving all intermediate points:

From junction Sheridan Avenue and Ardmore Road in Hohokus over Sheridan Avenue to junction Franklin Turnpike, thence over Franklin Turnpike to junction North Maple Avenue, thence

over North Maple Avenue (through Ridgewood), to junction Franklin Avenue, thence over Franklin Avenue to junction North Broad Street, thence over North Broad Street to junction East Ridgewood Avenue, thence over East Ridgewood Avenue to junction Paramus Road in Paramus, thence over Paramus Road to junction New Jersey Highway 4, thence over New Jersey Highway 4 (through River Edge, Hackensack, Teaneck, Englewood, and Fort Lee) to the George Washington Bridge, and thence to terminal at 167th Street and St. Nicholas Avenue in New York City as specified above, and return over the same route with the operation restricted to week days.

RESTRICTION: The authority granted herein is subject to the condition that said carrier shall serve points on Sheridan Avenue between its intersection with Ardmore Road, and its intersection with Franklin Turnpike, in Hohokus, N. J., only in connection with its previously authorized route to and from New York, N. Y., via the George Washington Bridge.

Between Rochelle Park, N. J., and New York, N. Y., serving all intermediate points:

From junction Rochelle Avenue and Central Avenue in Rochelle Park over Rochelle Avenue to junction Passaic Street, thence over Passaic Street (through Maywood and Hackensack) to junction Linden Street, and thence to Terminal at 167th Street and St. Nicholas Avenue in New York City, as specified above, and return over the following route:

From the terminal at junction 167th Street and St. Nicholas Avenue in New York City over St.

*Appendix D –*

Nicholas Avenue to junction 179th Street, thence over 179th Street to the George Washington Bridge, and thence to Rochelle Park over the route specified above.

Between Ridgewood, N. J., and Oradell, N. J., serving all intermediate points:

From junction Broad Street and East Ridgewood Avenue in Ridgewood over South Broad Street to junction Ackerman Avenue, thence over Ackerman Avenue (through Glen Rock, N. J.), .....
.....
..[numerous streets named in detail of routes]..
.....
.....

Between Paterson and Midland Park, N. J., and Manhattan, New York, N. Y., serving all intermediate points:

From junction Church and Market Streets in Paterson over Church Street to junction Broadway, thence over Broadway to junction East Thirty-third Street, thence over East Thirty-third Street to junction Morlot Avenue, thence over Morlot Avenue .....
.....
..[numerous streets named in detail of routes]..
.....
.....

RESTRICTION: Operations over the above-specified route shall be conducted only in conjunction with the service performed over applicant's previously authorized route from junction New Jersey High-

ways 17 and 4 over New Jersey Highway 4 to the George Washington Bridge, and thence over the George Washington Bridge to New York, N. Y., returning over the same route.

IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

AND IT IS FURTHER ORDERED, That this certificate shall supersede Certificate No. MC 668, issued July 6, 1948, and that said certificate be, and it is hereby canceled.

By the Commission, division 1.

HAROLD D. McCOY,
Secretary

(SEAL)

* This certificate embraces the operating rights in the certificate superseded and cancelled in the last ordering paragraph above and those operations authorized in Docket No. MC 668 Sub 49.

## APPENDIX E

### Order of Court of Appeals of the State of New York, Denying Leave to Appeal, October 3, 1963

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the third day of October, A. D. 1963.

Present, HON. CHARLES S. DESMOND,

Chief Judge, presiding.

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1 Mo. No. 671

Inter-City Transportation Co., Inc.,

Appellant,

vs.

Henry A. Barnes, as Commissioner of Traffic of the City of New York,

Respondent.

---

A motion for leave to appeal to the Court of Appeals and for a stay in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

(SEAL)

A copy

GEARON KIMBALL
Deputy Clerk

## Appendix F

**Order of Affirmance on Appeal, by Appellate Division of the New York Supreme Court, First Judicial Department, and Judgment Entered Thereon:**

### Order

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 11th day of July, 1963.

Present: Hon. Bernard Botein,
Presiding Justice.
" Benjamin J. Rabin,
" James B. M. McNally,
" Harold A. Stevens,
" Samuel W. Eager,
Justices.

6255
6256

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Inter-City Transportation Co., Inc.,
Plaintiff-Appellant,

*vs.*

Henry A. Barnes, as Commissioner of Traffic of the City of New York,
Defendant-Respondent.

---

An appeal having been taken to this Court by the plaintiff-appellant from an order of the Supreme Court, New York County, entered on the 8th day of May, 1963,

denying plaintiff's motion for an injunction pendente lite and granting defendant's cross-motion for summary judgment dismissing the complaint, and from the judgment entered thereon on May 17, 1963, and said appeal having been argued by Mr. Herman Horowitz of counsel for the appellant, and by Mr. William A. Marks of counsel for the respondent; and due deliberation having been had thereon,

IT IS HEREBY UNANIMOUSLY ORDERED AND ADJUDGED that the judgment and order so appealed from be and the same are hereby, in all things, affirmed; and that the respondent recover of the appellant the costs of this appeal.

Enter:

VINCENT A. MASSI,
Clerk.

*Appendix F*

**Judgment**

SUPREME COURT,

NEW YORK COUNTY.

---

INTER-CITY TRANSPORTATION CO., INC.,

Plaintiff-Appellant,

*v.*

HENRY A. BARNES, as Commissioner of Traffic of the the City of New York,

Defendant-Respondent.

---

The plaintiff-appellant having appealed to the Appellate Division of the Supreme Court, First Department, from the order of the Supreme Court entered in the office of the Clerk of the County of New York on or about the 8th day of May, 1963, denying plaintiff's motion for an injunction pendente lite and granting defendant's cross motion for summary judgment dismissing the complaint and from the judgment entered thereon in the office of the Clerk of said county on the 17th day of May, 1963, and the appeal having been duly argued at the Appellate Division and that Court in an order dated the 11th day of July, 1963 (a certified copy of which order was entered in the office of the Clerk of the County of New York on or about the 12th day of July, 1963 having unanimously ordered and adjudged that the judgment and order so appealed from be affirmed in all things and that the respondent recover of the appellant the costs of the appeal and the costs of

the defendant-respondent having been duly taxed at the sum of $134.36.

Now, on motion of Leo A. Larkin, Corporation Counsel, attorney for defendant-respondent, it is

ADJUDGED that the judgment entered herein in the office of the Clerk of New York on of about the 17th day of May, 1963, be and the same hereby is in all things unanimously affirmed; and it is further

ADJUDGED that the defendant-respondent, Henry A. Barnes, as Commissioner of Traffic of the City of New York (Municipal Building, Borough of Manhattan, New York City), recover of the plaintiff-appellant, Inter-City Transportation Co., Inc. (146 E. Passaic St., Maywood, N. J.), the sum of $134.36 costs as taxed and that said defendant-respondent have execution therefor.

Dated: July 16, 1963.

9:05 A. M.

JAMES McGUIRRIN,
Clerk.

Office Supreme Court, U.S.
FILED
JAN 22 1964
JOHN F. DAVIS, CLERK

(37389)

IN THE

# Supreme Court of the United States

October Term, 1963

No. 723

INTERCITY TRANSPORTATION CO. INC.,
*Petitioner,*

*against*

HENRY A. BARNES, as Commissioner of Traffic of the City of New York,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

# Supreme Court of the United States

**October Term, 1963**

**No. 723**

INTERCITY TRANSPORTATION CO. INC.,
*Petitioner,*

*against*

HENRY A. BARNES, as Commissioner of Traffic of the City of New York,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The petitioner seeks a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, First Department, to review a judgment entered on an order of that court affirming a judgment of the New York Supreme Court, County of New York, dismissing petitioner's complaint.

On November 12, 1963, Mr. Justice HARLAN denied, for lack of a "substantial federal question," petitioner's application for a stay pending the making of the instant application for a writ of certiorari.

## Jurisdiction

Petitioner asserts (Petition p. 2) that the Appellate Division, First Department of the New York Supreme Court is "The highest New York court in which a decision could be had" apparently because on October 3, 1963, the New York Court of Appeals denied petitioner's application for leave to appeal to that court.

But petitioner was not obliged to seek leave to appeal to the Court of Appeals. For the New York Civil Practice Law and Rules §5601(b), in effect since September 1, 1963, authorize an appeal to the Court of Appeals as of right

> "1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States".

A similar provision was contained in the former New York Civil Practice Act §588 subd. 1(a), which was superseded by the New York Civil Practice Law and Rules on September 1, 1963.

It is clear that throughout this litigation petitioner has sought to enjoin the respondent's actions upon the ground that those actions invaded petitioner's rights under the Constitution of the United States and constituted interference with commerce among the states in violation of Section 8 of the Constitution of the United States (Petition pp. 3, 4).

Indeed, on July 12, 1963 petitioner applied to Judge FULD of the New York Court of Appeals for a stay pending petitioner's then contemplated appeal as of right to that court as authorized above. The plan for such an appeal was abandoned apparently because petitioner was unwilling to risk its dismissal for lack of a substantial constitutional question. 6

Under these circumstances, it is clear that the Appellate Division of the New York Supreme Court, First Department is not the highest court of the State of New York from which petitioner could have obtained a decision as provided in 28 U. S. C. §1257(3). *Gorman v. Washington Univ.*, 316 U. S. 98, 100 (1942), approved and distinguished in *Teamsters Local v. Lucas Flour Co.*, 369 U. S. 95, 98-99 (1962); *Gotthilf v. Sills*, — U. S. —, 11 L. ed 2d 150 (1963).

## The Question Presented

The petitioner is an interstate carrier for hire. It transports passengers and their baggage between certain points in the State of New Jersey and its private bus terminal at West 167 Street and St. Nicholas Avenue in New York City, *via* the George Washington Bridge connecting the States of New York and New Jersey, by virtue of a "Certificate" of Public Convenience and Necessity issued by the Interstate Commerce Commission by authority of the Motor Carrier Act of 1935 as amended (49 U. S. C. §301 *et seq.*).[7]

[7] Relevant excerpts from that certificate appear in petitioner's Appendix D.

The basic question involved is whether respondent's notice directing petitioner to discontinue stopping its buses on the streets of the City of New York, for the purpose of picking up and discharging its passengers, constitutes a violation of any of petitioner's rights under the Constitution of the United States or an interference with interstate commerce.

## The Facts

The essential facts are not disputed. Indeed most of them are matters of public record.

The petitioner is an interstate carrier for hire, engaged in the business of transporting passengers and their baggage by motor carrier between certain points in New Jersey and its terminal at St. Nicholas Avenue and 167 Street in the Borough of Manhattan, City and State of New York by way of the George Washington Bridge.

As previously noted, this operation is in pursuance of a Certificate of Public Convenience and Necessity granted to petitioner by the Interstate Commerce Commission on December 28, 1955 in pursuance of the provisions of the Motor Carrier Act of 1935 as amended. Those provisions are now contained in 49 U. S. C., 307(b) of which provides:

> "No certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highways."

The petitioner's aforementioned bus terminal is practically adjacent to the West 168th Street station of the Independent subway and the West 168th Street station of

the I. R. T. subway (235).* It is further undisputed that until shortly prior to the commencement of the action herein in the Supreme Court, New York County, two other bus companies, viz.: Public Service Coordinated Transport Co. and Rockland Bus Co. conducted operations similar to the above described petitioner's operation, to the respective bus terminals of those companies which were practically adjacent to petitioner's terminal.

Prior to 1959, the only authorized stops in New York City for the buses of the petitioner and for its competitors above named were on the plazas of the George Washington Bridge, near its New York end, and wholly outside the lines of any street, viz.: There was a stop on the South Plaza for "inbound" buses, and a stop on the North Plaza for "outbound" buses (241, 242). It is undisputed that those two stops were the petitioner's only authorized stops within the City of New York prior to the times hereinafter mentioned.

By letter dated August 12, 1959 (240, 244-246) the petitioner and the other two bus companies were advised that effective August 24, 1959 the stop on the South Plaza (for "inbound" buses) was being discontinued because of the construction work on the new level of the George Washington Bridge and on the new bus terminal at its easterly end. The letter further stated that effective August 24, 1959 a bus stop was being established for "inbound" buses on the west side of Broadway between West 178th and West 177th Streets, which was to continue in effect only during the period of construction of the new

* Numerals in parenthesis refer to folio numbers of the record in the New York Courts submitted by petitioner on this application.

level of the George Washington Bridge and the new bus terminal under construction at the easterly end of the bridge.

By letter dated March 20, 1961, petitioner and its two competitors aforementioned were advised that the bus stop on the North Plaza for "outbound" buses was being discontinued because of "George Washington Bridge construction on Ft. Washington Avenue" and that effective March 22, 1961 a bus stop was being established for "outbound" buses on the easterly side of Broadway between West 176th Street and West 178th Street for approximately ten months from March 22, 1961 (247, 248).

It is undisputed that all construction work on the new level of the George Washington Bridge as well as on the bus terminal at the easterly end of the bridge was completed on or about January 14, 1963 and that petitioner's competitors aforementioned have since not used either of those bus stops. It is further undisputed that by letter dated January 14, 1963 petitioner was advised that the Broadway bus stops were being discontinued effective February 4, 1963 "providing only closed door service between New Jersey and your 167th Street terminal" (67, 69).

## POINT I

**The designation of the Broadway bus stops did not vest petitioner with any property rights in them. As a consequence their discontinuance did not constitute a taking of petitioner's property without due process of law.**

***a. The petitioner did not have a vested property right in the terminated bus stops.***

The petitioner's complaint charged that the termination of its bus stop privileges deprived it of its liberty and property without due process of law (57).

We are unable to perceive how the termination or expiration of petitioner's former street bus stop privileges deprived it of its liberty. The petitioner may be subject to penalties and its employees will be subject to arrest only if the employees continue to stop to take on or to discharge passengers at the former street bus stop locations. Besides, the notices which established those street bus stops expressly indicated that their existence was for limited periods which have expired. The expiration of a granted right, limited as to time, does not amount to a taking of property without due process of law. *Detroit United Railway* v. *Detroit*, 229 U. S. 39, 46 (1913).

We can readily show that petitioner does not possess a right to a street bus stop by virtue of either federal law or state law. The federal statute which is the sole basis for plaintiff's operation provides [49 U. S. C. §307(b)]:

> "No certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highways."

It is thus clear that no provision of federal law entitles plaintiff to any street bus stop. Petitioner's sole right under federal law as an interstate carrier is to be afforded the use of public streets to enable it to get to its terminal on private property. This right has not been invaded.

Petitioner has no right under New York Law to a street bus stop for the purpose of taking on or discharging passengers. This was the clear holding in *Bus Depot Holding Corp.* v. *Valentine*, 288 N. Y. 115 (1942) where it was said (pp. 120-121)

> "By these regulations the operation of buses engaged in interstate commerce has been confined to certain specified streets in Manhattan. 'Long haul' buses have not been permitted to make 'street stops' in order to pick up or to discharge passengers. Such buses must use terminals on private property and there take on and discharge passengers. These regulations have not heretofore been challenged by owners of property or by operators of buses. Even now the authority of the Police Commissioner to make such regulations is not seriously challenged, and perhaps could not be successfully challenged."

The observation that " 'long haul buses' have not been permitted to make 'street stops' " is a clear indication that the street stops made by other interstate buses have been by permission and not as a matter of right.

Indeed, such stops would constitute the use of the City's streets for the conduct of an omnibus business—an activity

prohibited by the City's Administrative Code, §362-1.0, because plaintiff does not possess a franchise granted by the City's Board of Estimate. That Administrative Code section provides:

> "§362-1.0 *Stage and omnibus routes forbidden until franchise obtained.*—It shall be unlawful for any omnibus route or routes for public use, or any alteration or extension thereof, or any alteration or extension of any existing stage or omnibus route to be operated in or upon any street within the city until and unless a franchise or right therefor shall be obtained from the board of estimate in like manner as, and subject to the limitations and conditions relating to, franchises or rights, provided and imposed by the charter and the code."

**b. *The power to establish street stops for buses is a police power the exercise of which the petitioner may not compel.***

In *Cities Service Oil Co. v. City of New York*, 5 N Y 2d 110 (1958), cert. den. 360 U. S. 934 (1959), the Court had occasion to consider the nature of the power to establish bus stops, conferred upon the City's Commissioner of Traffic. The precise question involved was whether the establishment of bus stops in front of the curb cut entrances to that plaintiff's filling station, and the use of such stops in a manner which caused a financial loss, amounted to a taking of property requiring compensation and entitled that plaintiff to injunctive relief.

The Court noted (p. 114) that the then New York City Charter (1063 [new City Charter (883.b] vested the City's Commissioner of Traffic with the power to establish bus stops and held (p. 117):

> "The establishment of bus stops is indisputably performed in the proper exercise of governmental [police] powers and may neither be regarded as a 'taking' nor serve as a predicate for a cause of action. Any loss resulting from the interference with an abutting owner's enjoyment of his property is *damnum absque injuria* and the owner must bear it."

There the plaintiff as an owner of property abutting upon a public highway had a vested property right of access thereto. Petitioner does not have a vested property right in any of the City's public highways. As we have already shown, its only right as an Interstate motor carrier is to be afforded a route to its terminal, a right which it enjoys. The ruling in the *Cities Service* case that the exercise of the police power of establishing bus stops may not be enjoined, requires a ruling that the exercise of that power may not be compelled. Indeed, this is not even a federal question.

Moreover, the petitioner here is seeking not injunctive relief against the termination of street privileges but rather an extension of street stop privileges which have expired. As previously noted (*supra*, pp. 5, 6), the original notices establishing the subject street stops limited their duration to the period of construction work on the George Washington Bridge and the bus terminal at its easterly end, periods which were later extended to February 4, 1962. The petitioner is thus in effect seeking a judicial extension of those street stop privileges.

## POINT II

**The street stop termination notice applies alike to all interstate buses coming into New York via the George Washington Bridge. As a consequence the fact that interstate buses are permitted street stops in other areas in the City with equal or greater vehicular congestion than within the vicinity of that bridge results neither in unreasonable discrimination nor in a denial to petitioner of the equal protection of the laws. The disposition of the legal issues upon affidavits does not constitute a denial of due process under the Fourteenth Amendment.**

The petitioner urges that the action of the respondent in terminating the street stop privileges for petitioner's buses while at the same time permitting such stops for interstate buses in other areas of the City having equal or greater vehicular congestion than exists in the vicinity of the George Washington Bridge amounts to arbitrary and illegal discrimination in violation of its constitutional rights and denies petitioner the equal protection of the laws in violation of its constitutional rights (56-58).

It is to be noted that there is no dispute that there is vehicular traffic congestion within the vicinity of the bridge. Indeed many responsible city officials publicly and officially acknowledged the existence of such congestion in the area near the bridge (117-122).

Under these circumstances, it is plain that the respondent's action does not constitute unreasonable discrimination nor a denial to petitioner of the equal protection of the laws. For the Constitution does not bar all discrimi

nation; it bars only unreasonable discrimination. This has been held to permit legislative classifications to be made based upon any logical reason. *Lindsley v. National Carbonic Gas Co.*, 220 U. S. 61, 78 (1911); *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 160 (1912); *Keokee Coke Co. v. Taylor*, 234 U. S. 224 (1914); *Metropolitan Co. v. Brownell*, 294 U. S. 580, 584 (1935).

We need hardly add that the granting of summary judgment in a case where there are no triable issues of fact does not offend any provision of the Constitution. *Ex Parte Peterson*, 253 U. S. 300, 309, 310 (1920); *Fidelity & Deposit Co. v. United States*, 187 U. S. 315, 319, 321 (1902); *Iowa Central Railway Company v. Iowa*, 160 U. S. 389 (1896); *Gen. Investment Co. v. Interborough R. T. Co.*, 235 N. Y. 133, 143 (1923). This case does not involve any material issue of fact. Indeed petitioner has not cited a single issue of fact requiring a trial.

It is thus clear that plaintiff's claims of violations of its constitutional rights are patently without merit.

## POINT III

**Petitioner distorts the facts and misconceives the issues in the action.**

(1)

The statement that "petitioner could not comply with respondent's order * * * [because] That order contradicted the I. C. C. certificates by forbidding service at 'all intermediate points' in New York State" (Petition, p. 7) is not the fact. The I. C. C. certificate did not authorize

stops at intermediate points in New York State. It authorized service between "Ridgewood, N. J., and New York, N. Y.," *serving all intermediate points between Ridgewood, N. J. and New York City.* That does not mean between the George Washington Bridge in New York City and petitioner's bus terminal in New York City. We need hardly add that the Interstate Commerce Commission lacks power to authorize the conduct of an omnibus business on the streets of the City of New York.

**(2)**

None of petitioner's authorities, except *Parker* v. *Silverton*, 109 Ore. 298, 305; 220 P. 139, 141 (1923) (Petition, p. 11), involved the right of a bus to stop on the streets of a city for the purpose of picking up and discharging passengers. But that case involved an intra-state common carrier operating between the City of Salem and the City of Silverton in Oregon by virtue of a permit issued by the Oregon Public Service Commission. It brought an action to declare null and void a local ordinance adopted by the defendant City prohibiting omnibus operation within that City without the payment of an annual license fee. The court declared the ordinance invalid (p. 141) because it was "an attempt to exercise power not conferred by the [Oregon] Legislature upon the City." The New York City Charter and Administrative Code provisions as noted *supra*, enacted by the New York Legislature, prohibit the conduct of the omnibus business upon the streets of the City without the grant of a franchise.

*Callanan* v. *Gilman*, 107 N. Y. 360 (1887) (Petition, p. 10) involved the right of the defendant property owner

to obstruct the sidewalk in front of his premises with a wooden bridge so as to bar pedestrians for lengthy periods from using that portion of the sidewalk (107 N. Y. at pp. 368-369). The Court ruled such obstruction to be illegal. The phrase "A coach or omnibus may stop in the street to take up or set down passengers" (107 N. Y. at p. 365) was intended to illustrate street uses which may be authorized, not street uses which may be enjoyed as a matter of right. *Cf. City of New York v. Bee Line Inc.*, 246 App. Div. 28 (1st Dept., 1935), aff'd 271 N. Y. 595 (1936) where the Appellate Division observed (p. 34):

> "The city itself concededly has the power and the duty to prosecute companies which illegally run buses for hire * * *."

It is respectfully submitted that the above authorities demonstrate that the petition does not show the existence of any substantial question of law entitling the petitioner to invoke the jurisdiction of this Court.

## CONCLUSION

**The petition for certiorari should be denied.**

January 21, 1964.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No. 723

INTER-CITY TRANSPORTATION CO. INC.,

Petitioner,

*against*

HENRY A. BARNES, as Commissioner of Traffic of the City of New York,

Respondent.

## REPLY BRIEF OF PETITIONER IN SUPPORT OF WRIT OF CERTIORARI

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## REPLY BRIEF OF PETITIONER IN SUPPORT OF WRIT OF CERTIORARI

### I

### As to Jurisdiction

The jurisdiction of this Court was not defeated by petitioner's choice between two equally available methods of presenting this cause in the New York Court of Appeals.

Upon the affirmance herein by the Appellate Division of the New York Supreme Court, petitioner had available alternative means of approach to the New York Court of Appeals, *viz.* by motion for leave to appeal, and by appeal taken as of right. Petitioner chose the former, because an appeal by permission is *plenary*: it brings up all

questions arguable upon the record; and the present record made available for reversal non-constitutional questions which a court will consider before reaching constitutional questions (*e. g.*, the unreasonableness of respondent's prohibitory order, particularly as that order needlessly entailed the total extinction of petitioner's business [fols. 136, 166-169; 30-32, 47-49] and the scope of the public easement of the highway in relation to omnibuses, etc.). Petitioner was not required to abandon such questions in order to have access to the Court of Appeals: a reversal there could have occurred on such questions without approach to any matters of constitutional law, state or federal.

On the other hand, the appeal as of right after such an affirmance as here occurred is a limited appeal, confining the jurisdiction of the Court of Appeals to constitutional questions "directly involved". New York Civil Practice Act, Sec. 588, sub. 1(a), so provided; the same provision continues in New York Civil Practice Law and Rules, Sec. 5601(1).

What "directly involved" means in this relation appears thus in Cohen & Karger, Powers of the New York Court of Appeals (Rev. ed. 1952), page 256:

> "Another feature which subdivisions (1) and (4) of section 588 possess in common is that they do not authorize appeal as of right unless the asserted constitutional question was decisive of the determination appealed from. It is not enough, for the purposes of these provisions, that a constitutional question is involved merely in the sense that it *might* have been passed upon below; or even that it *was* passed upon if it constituted only one of the alternative grounds of decision. It must clearly appear that the courts below took a view of the case which required them necessarily to pass upon the constitutional question in order to make their decision."

It was in August 1963, that petitioner had to choose the mode of approach to the Court of Appeals. There was then no way of knowing what supported the Appellate Division affirmance; no opinion was uttered. The Special Term opinion was equivocal. Handicapped by this state of affairs, petitioner was obliged to make its embarrassed application to Mr. Justice Harlan.

It was not until December 18, 1963 that the Appellate Division announced that, necessary to its decision herein, was the determination of stated federal constitutional (and statutory) questions. Had petitioner known in August what it thus learned in December, it would have made its election between the two available means of approaching the Court of Appeals more confidently: the choice, however, would have been the same.

*Gorman* v. *Washington University*, 316 U. S. 98, cited by respondent, is irrelevant: there the petitioner neglected to apply for the convening of the court (Supreme Court of Missouri sitting *en banc*) as the highest appellate court; *Gotthilf* v. *Sills*, —— U. S. ——, 84 Sup. Ct. 187, 11 L. ed. 2d 159, is likewise irrelevant: there, petitioner failed to use the only properly available approach to the New York Court of Appeals, after failing to secure the attention of that Court in two improper attempts. In the present instance the Court of Appeals, properly approached, declined to take jurisdiction. We believe that here, this Court, as in *American Ry. Express Co.* v. *Levee*, 263 U. S. 19, 21, would rely on the "ostensible character of declining jurisdiction" thus manifested, and regard the Appellate Division as the highest state court in which a decision could be had.

## II

## Respondent Concurs With Petitioner as to the Questions Involved Herein

**(a)**

Respondent's brief joins issue with petitioner as to whether petitioner's rights under the Motor Carrier Act as certificated by the Interstate Commerce Commission entail stoppage as well as transit of City streets, as to whether New York law can with constitutional effectiveness prohibit such stoppage, as to whether petitioner's short-haul commuter operations are properly classifiable for purposes of regulation with long-haul operations, as to whether an interstate carrier duly certificated can validly be required to have a state franchise as well.

**(b)**

Respondent wholly ignores the controlling authorities which petitioner adduces respecting these subjects.

## CONCLUSION

**The writ of certiorari should be granted.**

Dated: New York, January 28, 1964.

Respectfully submitted,

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*Respondent.*

## SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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# Supreme Court of the United States

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---

## SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

### Jurisdiction

Petitioner concedes (Reply Brief, pp. 1, 2) that it could have taken an appeal to the New York Court of Appeals as of right under New York Civil Practice Act, §588, sub 1(a) (superseded on September 1, 1963 by New York Civil Practice Law and Rules §5601(b)). Petitioner states that it chose instead to apply to the New York Court of Appeals for leave to appeal in order to make "available for reversal non-constitutional questions" which it asserts could not be considered on an appeal as of right.

This argument is without basis in fact.

The New York Court of Appeals has consistently ruled that where an appeal has been taken to that

Court as of right from the Appellate Division on constitutional grounds, nonconstitutional questions will also be considered. See for example, *Matter of Kohnberg v. Murdock* 5 N Y 2d 859, 860 (1958) where the Court stated "nonconstitutional questions may be argued, along with constitutional issues, when the appeal is taken as of right under paragraph (a) of subdivision 1 of section 588 of the Civil Practice Act." See also COHEN AND KARGER, Powers of the New York Court of Appeals (Rev. ed. 1952), page 257.

Petitioner's quotation from page 256 of this book (Brief, p. 2) is not in conflict with our contention on this issue and deals with a different problem.

## Conclusion

The petition for certiorari should be denied.

January 31, 1964.

Respectfully submitted,

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